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NO. 82-503

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LELAND LESTER SHAVER,

Petitioner,

VS.

BOB L. HUNTER, ET AL.,

Respondents.

On Writ of Certiorari to the Court of Appeals for the Seventh Supreme Judicial District of Texas

---

BRIEF IN OPPOSITION

CARR, EVANS, FOUTS & HUNT
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ATTORNEYS FOR RESPONDENTS
October 25, 1982

DONALD M. HUNT
SBN 10284000
Of The Firm

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QUESTION PRESENTED

May a petitioner, seeking review by the Supreme Court of a state court's adjudication of a dedication deed's restrictive covenant, predicate the presence of a "case or controversy" on mere dictum in the opinion on an issue which the parties do not dispute and on which no controvery exists?

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*The other party respondents are John Zakrasek, Osco Abney, D.D. Tibbets, and Myron Hart.

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BRIEF IN OPPOSITION

TO THE SUPREME COURT OF THE UNITED STATES:

Respondents, BOB L. HUNTER and the other Homeowners, appellees in the Court of Appeals for the Seventh Supreme Judicial District of Texas (and plaintiffs below) respectfully submit this brief in opposition to the petition for writ of certiorari filed by petitioner, LELAND LESTER SHAVER (appellant-defendant below). For clarity, petitioner, the lessor of the property in issue, is called "the Landlord" and the respondents are called "the Homeowners".

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of U.S. CONST., art. III, §2, provide:

> The judicial power shall extend to all cases * * * arising under this Constitution * * *.

STATEMENT OF THE CASE

The Landlord correctly states the course of proceedings and the results in the trial and appellate courts.

The Landlord also correctly states the majority of the facts. As the Landlord accurately observed, he argued certain state common law principles in his attempt to invalidate the covenant. Using state law principles applicable to restrictive covenants, the Landlord urged that public policy, as expressed at the state and federal levels, in combination with the unreasonableness of the covenant, made it unenforceable. As the Landlord also correctly observed, the court of appeals to which certiorari is sought

raised the "issue" now challenged without the assistance of any party. No party, either then or now, urged the issue. Indeed, as the Landlord admitted (PETITION, p. 7), no one had standing to raise the issue!

The Landlord, however, failed to mention all of the evidence concerning the public policy. The policy, even as the Landlord enunciates it, is to encourage the development of living alternatives for handicapped people in the least restrictive situations and in as normal a setting as possible. In support of the policy, the Landlord presented evidence that handicapped persons do better in residential surroundings. However, witness after witness for the Landlord admitted that the same development could and does occur where handicapped persons reside in multi-family areas and in single-family areas without restrictions. Numerous viable alternatives exist for handicapped persons to achieve that same improvement in other subvidisions of Lubbock, Texas.

SUMMARY OF ARGUMENT

This court should deny certiorari, because no "case or controversy" is present. The Landlord attempts to complain of the sua sponte adjudication of an "issue" neither raised nor argued before the court of appeals. As such, the offending language, contained in a scant two or three sentences in a single paragraph, constitute nothing more than dictum. Therefore, because no party raised the issue and because no party now advocates the issue, no case or controversy exists to adjudicate.

ARGUMENT

THE SUPREME COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI, BECAUSE NO "CASE OR CONTROVERSY" BETWEEN THE LANDLORD-PETITIONER AND THE HOMEOWNER-RESPONDENTS CAN EXIST BASED ON DICTUM ON AN ISSUE WHICH THE PARTIES DO NOT DISPUTE AND ON WHICH NO CONTROVERSY EXISTS.

This court should summarily reject the petition for writ of certiorari, because no case or controversy exists. U.S.CONST.,

art. III, §2, requires that a "case or controversy" be present before the judicial power to review exists. In this instance, there is no controversy but only an attempt to use a scant few lines of dictum to seek review by this court. In such a context, no need exists for certiorari.

The necessity for existence of a "case or controversy" has long been settled. In re Summers, 425 U.S. 561 (1944); Preiser v. Newkirk, 422 U.S. 395 (1975); Babbitt v. United Farm Worker's Nat. Union, 442 U.S. 289 (1979). As described in Summers, 325 U.S. at 567, "[T]here must be an actual controversy over an issue, not a desire for an abstract declaration of law." Babbitt, 442 U.S. at 298, describes the requirement as "* * * substantial controversy * * * a definite dispute and concrete, not hypothetical or abstract."

The Landlord cannot meet these tests. As he admits in his petition, the court of

appeals raised the issue on its own. The Landlord only argued that state common law principles, combined with a public policy, made the covenant unenforceable. The Homeowners responded that public policy only required that the handicapped have the same rights and responsibilities as all citizens, a policy which could be accomplished without destruction of the covenants in issue. Thus, the court of appeals raised the issue sua sponte; as such, the offending language — only two or three sentences —constitutes nothing more than dictum which neither party either advocated then or now. Therefore, absent any real controversy, no case or controversy is presented for review.

A quick examination of the real controversy demonstrates the Landlord's problem. The Landlord relies on a public policy enunciated in federal and state statutes. These policy statements express the intent that handicapped persons should be in "home-living" situations where feasible. The goal of

the policy is to accord handicapped persons the least restrictive living alternatives in as normal a setting as possible. The policy thus promotes equal treatment. The command for equal treatment is best shown by TEX.REV. CIV.STAT.ANN. art. 5547-300, §2(c) (1977), where the legislature states that it seeks "to educate the general public to the fact that mentally retarded persons * * * have the same rights and responsibilities enjoyed by all citizens of Texas." The Homeowners have never quarreled with this public policy.

The Landlord's argument, however, is seriously flawed in two respects. First, the Landlord points to the existence of a policy as a premise on which to base his argument. Then the Landlord concludes that the restrictive covenant is unenforceable. The Landlord never bridges the gap between the premise and the conclusion with any authority. The mere existence of the policy does not require the conclusion. The second flaw represents

the reason why. Handicapped persons can receive benefits from deinstitutionalization and being placed in as normal a situation as possible in any home setting, whether in an apartment, a duplex or an unrestricted residential area. As thus stated, this is a controversy between the parties, not any federal constitutional issue.

Absent a real controversy, the petition for writ of certiorari should be denied.

CONCLUSION

For the reasons stated, the Supreme Court of the United States should deny the petition for writ of certiorari to the Court of Appeals for the Seventh Supreme Judicial District of Texas, and affirm the judgment of that court with costs taxed to the Landlord.

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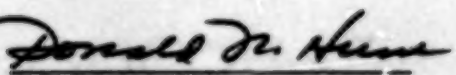

Donald M. Hunt

CERTIFICATE OF PARTIES

This brief has been served on the Landlord-petitioner by mailing a copy to his attorney, Renea Hicks, ADVOCACY, INC., 5555 North Lamar Blvd., Suite K-109, Austin, Texas, 78751, on October 25, 1982.

Donald Jr. Hess
Of The Firm